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AMERICAN BAR ASSOCIATION

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Jeffrey M. Senger
Deputy Senior Counsel for Dispute Resolution
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Room 4328
Washington, DC 20530

Dear Mr. Senger:

On behalf of the American Bar Association Section of Administrative Law and Regulatory Practice, I am pleased to transmit the Section's comments on the Report on the Reasonable Expectations of Confidentiality Under the Administrative Dispute Resolution Act of 1996. If you have any questions after reviewing these comments, I would be happy to respond.

Sincerely,

Ronald M Levin

Ronald M. Levin
Chair

Enclosure

COMMENTS OF THE SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE OF THE AMERICAN BAR ASSOCIATION ON REPORT ON THE REASONABLE EXPECTATIONS OF CONFIDENTIALITY UNDER THE ADMINISTRATIVE DISPUTE RESOLUTION ACT OF 1996 (65 FEDERAL REGISTER 59,200, OCTOBER 4, 2000)

The Section of Administrative Law and Regulatory Practice of the American Bar Association is pleased to submit these comments on the Report on the Reasonable Expectations of Confidentiality under the Administrative Dispute Resolution Act of 1996 ("Confidentiality Report"). The views expressed herein are presented on behalf of the Section of Administrative Law and Regulatory Practice. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.[1]

Introduction

The Section of Administrative Law and Regulatory Practice ("the Section") has long been interested in mediation, and has been an active proponent in encouraging its appropriate use in government. The Section represented the American Bar Association in Congress's consideration of the Administrative Dispute Resolution Act ("ADR Act") and the Negotiated Rulemaking Act. The Section was deeply engaged in the negotiations leading to these Acts both during their initial enactment in 1990 and their permanent reauthorization in 1996. Both Acts amend the Administrative Procedure Act to authorize and encourage agencies of the Federal Government to use mediation, and they provide the legal framework for doing so.

The Section applauds the Federal ADR Council for beginning to address some of the difficult and important issues relating to maintaining appropriate confidentiality protections for parties in disputes handled by federal agencies under the ADR Act. The Confidentiality Report reflects considerable effort to explicate many of the Act's provisions. It provides thoughtful analysis and useful information that will benefit numerous federal and private participants and neutrals in these disputes. The Report's authors are to be commended for developing such a high-quality document, especially in such a short period.

Unfortunately, given the brief 30-day period that has been afforded to comment on the Report, the Section must focus on a few critical issues of special concern. In particular,

[1] These comments are based on the existing policies of the American Bar Association, prior statements and activities of the Section, and consultations with senior officials of the Section.

we will address the vital importance of dealing more definitively with possible information requested from other agency entities, such as agency Offices of Inspector General, and the importance of assuring that future activities of the Federal ADR Council enhancing the guidance issued under the Report be conducted with an opportunity for maximum interaction with, and input from, knowledgeable and affected members of the private sector. The Section has also urged interested members and other individuals and their respective organizations to submit comments on the Report.

The Report should state that the ADR Act governs data requests from inspectors general and other sources

The Section believes that the ADR Act's plain language, its legislative history,[2] and various statements of its sponsors[3] express a strong governmental policy in favor of

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[2] As the Senate report for the original Act stated, the statute's confidentiality "...protections are created to enable parties to ADR proceedings to be forthcoming and candid, without fear that frank statements may be used later against them. Thus, documents produced during an ADR proceeding, such as proposals to resolve the dispute, are immune to discovery unless certain specific conditions are met." S. Rep. No. 1005, 101st Congress, 2d Sess., p. 11. Moreover, the confidentiality provisions of the ADR Act reflect research sponsored by the Administrative Conference of the United States, and were the product of extensive negotiations among a diverse array of entities interested in balancing open government and dispute resolution needs, including the American Bar Association and public advocacy groups such as Public Citizen. Most observers have found them to reflect an appropriate balance between the openness needed for legitimacy and oversight and the confidentiality necessary for many sensitive negotiations.

[3] For instance, in letter to James R. Ebbitt, Assistant Inspector General for Audit, OIG/USDA, dated July 16, 1997, Senators Charles Grassley and Richard Durbin stated:

> ....It has come to the attention of this subcommittee that the United States Department of Agriculture has been requesting disclosure of confidential mediation files involving cases brought under the USDA/FSA funded mediation grant program.
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> Senator Grassley sponsored, and Congress passed, the Administrative Dispute Resolution Act of 1990 (ADRA), and the permanent extension of the act in 1996....These laws are intended to promote agency use and development of alternative dispute resolution programs. The ADRA promulgated the procedure and structure that these programs were to take once implemented.
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> Section 574 of this act specifically addresses the issue of confidentiality of any dispute resolution/mediation communication or any communication provided in confidence to the neutral mediator. The spirit of sec. 574 is to encourage the use of alternative means of dispute settlement by preserving the integrity of these dispute resolution proceedings. This is achieved by sustaining the confidence of the parties that their communications will remain confidential in future cases.
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> During last year's debate over the re-authorization of the ADRA, a great deal of consideration and effort was extended to strengthening the confidentiality provisions of the act. We, therefore, question your authority under sec. 574 of the Act to request mediator neutrals to release the names and addresses of mediation participants and documentation of the mediation services provided to them, including the final disposition of their cases... Indeed, misguided precedents set under this particular program could

protecting "dispute resolution communications," as defined by the Act. Absent authorization by a statutory exception, a neutral is precluded by law from voluntarily making a disclosure or being compelled to make one. The Act represents a careful balance between open government, oversight, and confidentiality, in which Congress makes clear the standards and procedures that should govern whenever disputed issues of confidentiality arise in agency-related ADR. The ADR Act's stated intent is clear: to assure parties to ADR proceedings involving federal programs that communications they make in those proceedings will not later be used against them. Its language precluding voluntary and compulsory disclosure is explicit, its coverage broad, its exceptions narrowly drawn, and its procedures spelled out in detail.

The reasons for this are also clear: Congress, and indeed most people knowledgeable about mediation,[4] has expressed the strong belief that protection of confidentiality is necessary to assure the success of ADR processes. Congress, therefore, created in the Act a confidentiality section that is the most detailed of any federal or state ADR statute, explicitly stating its intent to give parties in federally-related ADR proceedings assurance that their dispute resolution communications would generally be "immune from discovery." Congress went on to define these protections in detail. The Act forbids neutrals from disclosing such communications, and also states that they shall not "be compelled to disclose" them. This Act requires prior notice to parties in any case where protected data are sought, an opportunity for the parties to contest disclosure before a federal court, and a decision by the court reached under a balancing test based on specific statutory criteria.

While the relation between the ADR Act and other laws and policies has not been explored extensively by the courts, the Act's language and history lead us to conclude that its detailed provisions are fully applicable to all ADR activities in administrative settings. The Report indicates, however, that there may be some "tension" between the ADR Act's specific provisions and other statutes, and that this tension may lead to a diminution of parties' expectations of confidentiality. We do not see the logic in this suggestion. The "tension" that the Report talks about (and then magnifies in the neutral's "Miranda warning") needlessly clouds the whole issue. With this question looming, prudent parties would be foolish to reveal much. Thus, the Report's lack of

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undermine the entire administrative dispute resolution process. The USDA is demanding disclosure of documentation from mediation neutrals that is protected under federal law. We are very strong advocates for combating fraud, waste, and abuse in government. However, there are more appropriate ways to accomplish these goals in this instance, and we feel it necessary for your office to respond to the concerns we have expressed herein....

[4] See, e.g., Freedman and Prigoff, *Confidentiality in Mediation: The Need for Protection*, 2 Ohio St. J. Dis. Res 37, 43-44 (1986); Harter, *Neither Cop Nor Collection Agent: Encouraging Administrative Settlements by Ensuring Mediator Confidentiality, 41 Admin. L. Rev.* 315, 323-324 (1989); Kirtley, *The Mediaton Privilege's Transformation from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest*, 1995 J. Dis Res. 1, 17.

resolution of this question will itself have some adverse effect. We appreciate that there are complex administrative and even political issues involved in the matter, but the Section strongly believes that it simply must be resolved.

While we recognize the importance of other statutes' approaches and goals, such as effective oversight of the expenditure of federal funds, we believe that the Report should be clearer in stating that the ADR Act's protections govern data requests from other sources inside and outside the government. An inspector general's ability to "have access to all records, reports, audits, reviews, documents, papers, recommendations or other material available to the establishment" would appear inadequate by its own terms to trump the Act's protections. First, the Act's procedures explicitly provide for the possibility of disclosure whenever a compelling case can be made to a judge and, second, the one federal court that has addressed the issue stated that an inspector general's "official curiosity" is not an adequate grounds to obtain access to protected documents.[5]

The ADR Act provides the appropriate resolution. Its judicial override provision accommodates requests from IGs just as it takes care of prosecutors, special counsels, and other requesters. Some may see some arguable issues relating to inspectors general obtaining information from federally employed neutrals. We do not. Although the Section sees some possible value in the Report's suggestion of future dialogue to address this issue, the Section believes the ADR Act's policy favoring confidentiality must be heeded in these cases. It is especially concerned that the continuing "cloud" over confidentiality could cause considerable harm in the meantime. As Senators Grassley and Durbin wrote to USDA's OIG in 1997, uncertainty as to OIG access could create doubts and concerns that would extend far beyond any single mediation program.

Although the Section recognizes the complex administrative issues involved regarding OIG investigations within agencies, we have seen no legal or policy analysis on this issue.[6] The Section believes, though, that sound analysis suggests that the issue be resolved generally at this time by applying the ADR Act's provisions to all neutrals across the board.[7]

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[5] *Breakey v. Inspector General of the United States Department of Agriculture*, 836 F. Supp. 422 (E.D. Mich. 1993).

[6] The argument has been made that it would be inconvenient for inspectors general to have to resort to subpoenas for information in a neutral's possession; we do not believe that an inspector general's administrative convenience outweighs the ADR Act's explicit policy favoring protection of sensitive data. The Section is certainly aware of no constraints relating to OIGs' authority to issue administrative subpoenas seeking data from neutrals who are not federal employees; thus there is no plausible reason for not applying the ADR Act's judicial override provision in cases involving a private neutral. We believe it critical for the Report, at the very least, to make clear that the ADR Act's judicial balancing provisions apply to efforts by OIGs to obtain data from non-federal sources relating to public health and safety or similar concerns and to criminal investigations.

[7] To the extent that this cannot be resolved at this time, we suggest that this issue should be submitted to the Department of Justice's Office of Legal Counsel for an opinion.

The Report's model confidentiality statement should be revised

We also note that the Report's model confidentiality statement for use by neutrals in federal ADR proceedings, which contains much valuable information for parties, would benefit from some revision. Without engaging in a detailed critique, the Section wishes to point out that the overall tone of this statement is somewhat negative, and could discourage potential participants, and consequently, the growth of federal ADR. Moreover, the reference to potential disclosure if a mediator learns of "fraud, waste, and abuse" during a mediation -- whatever its conceivable relevance to federal employee mediators[8] -- does not appear to take into account the fact that private sector neutrals do not, and should not, operate under regulatory or statutory duty to report such behavior. Finally we note that to the extent that the Report emphasizes that parties may contract for a different, more extensive, degree of confidentiality, the mediator statement is somewhat misleading. It may be worthwhile ensuring that parties are aware that, to the extent they contract among themselves for greater protection than the ADR Act provides, they cannot necessarily expect their agreement to bind FOIA requesters or other outside parties (e.g., litigants seeking discovery).[9] We also believe the model mediator statement may be misleading when presented to potential parties by intake workers or dispute resolution program administrators, who are defined as neutrals under the Act by the Report.

Future efforts to address confidentiality in federal ADR should include consultation with all affected interests

We note that the Report makes reference to possible future actions by the Federal ADR Steering Committee, including development of guidance on best practices and dialogue with PCIE, ECIE, and numerous other federal entities on issues not fully addressed in the Report. We would point out that the ABA Sections of Dispute Resolution, Administrative Law & Regulatory Practice, and Public Contract Law last spring formed an Ad Hoc Committee on Federal ADR Confidentiality to work via a collaborative process and to develop by consensus guidance on relevant legal and practical issues. The ABA's Ad Hoc Committee has sought explicitly to bring together knowledgeable representatives of many diverse public and private entities whose members are vitally affected by decisions on confidentiality in government ADR. While the Committee itself is unable to provide detailed comments within the time period allotted, given its

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[8] Some federal mediation programs, including the Sharing Neutrals Program administered in the Department of Health and Human Services, have concluded that the ADR Act takes precedence as regards OGE regulations and other non-statutory authorities. The Shared Neutrals Program's code of ethics provides that federal employees mediating in their programs have no obligation to report instances of fraud, waste or abuse when doing so would contravene the ADR Act's confidentiality section.

[9] The Report should also point out that although the ADR Act may not provide confidentiality to communications made in a general session, other privileges may well attach (or FRE 408) to preclude its admission into evidence even though not protected under the ADR Act.

structure and responsibilities to its sponsoring ABA sections, there are many areas of concern raised by the Report that the Committee believes merit further and sustained consideration.

In these circumstances, we would be delighted to work closely with the ADR Council in this important area. Perhaps the revised Report issued by the Council could state that future efforts related to explication and guidance on Federal ADR confidentiality will explicitly include close cooperation between the Interagency Steering Committee, the ABA's Confidentiality Committee and its sponsoring sections, and other private sector interests affected by these decisions. In any case, we hope that these efforts will not be limited only to federal entities, as was unfortunately the case in the preparation of the current Report. We expect that the ABA Committee's work will produce collaborative recommendations covering some of the points raised in the Report, and hope that it will be able to offer to the Interagency ADR Steering Committee and, through the Steering Committee, to the entire Federal ADR community perspectives and ideas that may improve upon some aspects of the Report.

For these reasons, we ask that the ADR Council recognize that ADR confidentiality is a developing area of law and practice affecting many governmental and private interests, and that the ADR Council put forward the confidentiality guidance in a manner that acknowledges the value of continued exploration of these complex, potentially controversial, issues in collaboration with all affected interests and incorporates resulting good ideas into its guidance.

Conclusion

In conclusion, the Section again wishes to congratulate the Council on development of this thoughtful Report on a challenging, complex topic. The Report contains much of value, and we wish to emphasize that our serious concerns -- about the importance of making changes to the Report to reflect the ADR Act's applicability to inspector general investigations and to improve the model neutral's statement -- apply only to a small number of segments, as well as the method of its development. If the Council addresses these concerns, and especially if it makes clear that the Report represents a first step in an interactive process for continual improvement based on collaboration with other affected interests, public and private, then the Report will mark a vital, positive step in the growth of federal ADR.